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IN THE SPECIAL COURT (TRIAL OF OFFENCES RELATING TO TRANSACTIONS IN SECURITIES) AT BOMBAY

MISC. APPLICATION NO. 255 of 1994

Harshad S. Mehta .... Applicant

Vs.

PNB Mutual Fund & Anr. .... Respondents.

Mr. A. D. Desai with Mr. A. D. Chaugule with Mr. K. G. Desai i/b M/s. Mahimtura & Co. for the Applicant.

Mr. V. R. Dhond i/b M/s. Little & Co. for Respondent No. 1.

Mr. G. R. Joshi i/b M/s. P. M. Mithi & Co. Respondent No. 2.

CORAM: HON'BLE MR. JUSTICE
S. N. VARIAVA,
JUDGE, SPECIAL COURT.

15th September 1995.

ORAL ORDER:

1. This Application is by Harshad S. Mehta for recovery of 17% N.T.P.C. Bonds of the face value of Rs. 10 crores and the interest of Rs. 3.40 crores (which has been collected by the 1st Respondent) on these Bonds. This Application is based on the Judgment of this Court dated 14th December 1993 in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993. By this Judgment, it has been held that all Ready Forward Transactions are illegal. It has been held that if a Ready Forward Transaction was with a Notified Party, then the title/ownership in the security would not have passed to the purchaser and that the security would continue to be owned by the concerned Notified Party.

SPECIAL COURT (Trial of Offences Relating to Transactions in Securities) Act, 1992 BOMBAY

In that Judgment it has been held that as the security continued to be owned by the Notified Party, it was attached property and the alleged purchaser could not continue to retain possession of that security. It has been held that the alleged purchaser must therefore hand over the concerned security to the Custodian.

2. This Application is on the basis that there was a Ready Forward Transaction between the Applicant and the 1st Respondent under which 17% N.T.P.C. Bonds of the face value of Rs. 10 crores were sold, by the Applicant to the 1st Respondent, with a firm commitment that they would be resold to the Applicant. This is one of a large number of such Applications which are pending before this Court. In all these matters, including this Application, normally two questions arise for consideration i.e. (1) whether there was a Ready Forward Transaction and (2) whether the transaction was between the Applicant and the concerned Purchaser, in this case the 1st Respondent, on a principal to principal basis.

3. The second question arises because the Court has found that in many matters the Notified party has routed their own transaction through some Bank. Thus the Notified broker would, on paper, act as a broker and the transaction would be shown to be between two Banks. It is because, on paper the transaction is between two Banks, that in many cases, the purchaser contends that the Notified Party was only a broker. In spite of the transaction being, on paper,

between two Banks, some Banks (Purchasers) have honestly admitted that the real counter-party was the Notified Party. However, the majority of Banks (Purchasers) are denying that the Notified Party was the principal counter-party in their transaction. The Court has had occasion to try one such Application. That trial, under the normal procedure, lasted for over 30 working days. This Court has been specially established to ensure speedy justice. If normal procedure is followed, this aim of speedy disposal would be completely negatived. The Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 provides that the Code of Civil Procedure would not apply to this Court. Under this Act this Court is to evolve its own procedure keeping in mind the principles of natural justice. This Court has framed Regulations under which Affidavit Evidence, particularly evidence in chief, can be taken. Because of the very large number of such Applications, this Court has been directing all parties to serve on the other side Notice to admit facts.

4. The Applicant has served on the 1st Respondent a Notice to admit facts. In response the 1st Respondent has admitted certain facts and denied certain facts. The facts which are admitted are that (1) this was a Ready Forward Transaction for a period of 31 days with interest rate at 19% per annum and (2) that the Ready Forward Transaction was to be reversed on 19th May 1992. The 1st Respondent however denies that this Ready Forward Transaction was with the Applicant on principal to principal basis. They claim that

their transaction was with ANZ Grindlays Bank. Thus according to the 1st Respondent the transaction was between the 1st Respondents and ANZ Grindlays Bank on a principal to principal basis.

5. On the above admission the only question now remaining before this Court is whether the transaction was between the 1st Respondent and the Applicant on a principal to principal basis and/or whether the transaction was between the 1st Respondent and ANZ Bank on a principal to principal basis.

6. The Court has observed that the test of whether the transaction was with some other Bank or with the Notified Party on a principal to principal basis, is whether the amounts paid by the Purchasing Bank (always by Bankers Cheques/Pay Orders in names of counter-party Bank) were credited into the Notified Parties account with the other Bank. If that was done, it could only be because the Notified Party was the principal. Another test would be whether the other Bank delivered to the purchasing Bank its own securities or delivered securities on behalf of Notified Parties. These two factors are clinching factors. The Court has, in order to save time, in all such matters called for Court Evidence of the abovementioned two factors. This it has done by calling upon all counter-party Banks, in all these matters, to file evidence on Affidavits setting out:

a) if the concerned transaction was their own

b) whether the amount paid by the purchasing Bank was

credited into their own accounts or into Notified Parties account and

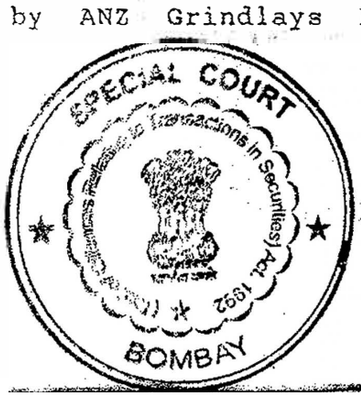
c) whose securities were delivered.

7. In this case the Court called upon ANZ Grindlays Bank to so state on affidavit. On 25th July 1995, ANZ Grindlays Bank filed their Affidavit Evidence. By this they set out that they have had no transaction with the 1st Respondent on a principal to principal basis. They set out that they have not entered into the contract dated 10th April 1992 in respect of 17% Taxable N.T.P.C. Bonds of the face value of Rs. 10 crores. They set out that the Account Payee Cheque issued by the 1st Respondent was credited into an Account of the Applicant in ANZ Grindlays Bank. They set out that the cheque was received by them along with a deposit slip for crediting the proceeds of the cheque into the Applicant's Current Account No. O1CBP 0486800 with their Sansad Marg Branch at New Delhi. They set out that the proceeds of the cheque have therefore been availed of by the Applicant. They set out that no securities belonging to ANZ Grindlays Bank have been delivered by them to the 1st Respondents under this transaction. It cannot be denied that 1st Respondent has received securities under this Contract. Now it is clear that those securities did not belong to ANZ Grindlays Bank. The only other party, concerned with the transaction, is the Applicant.

8. Thus by this Affidavit Evidence the case of the Respondents that there was a transaction between ANZ

Grindlays Bank and themselves on a principal to principal basis is prima facie belied. Even though this is Affidavit Evidence, in all these matters Court has permitted parties to file Affidavits-in-Reply to the evidence. This so that if all parties agree then the matter can be disposed off on Affidavits and without recording evidence. No Affidavit-in-reply to the Affidavit of ANZ Grindlays Bank has been filed by Respondent No. 1 till date. This in spite of the fact that since then the matter has appeared on board on at least two occasions. Of course I agree that if a party wants to cross-examine, then no Affidavit-in-Reply need be filed. But then the Court must be informed on the very first occasion that they desire to cross-examine. The Court was not even informed that the affidavit evidence of ANZ Grindlays Bank was being disputed and/or that the 1st Respondent desired to cross-examine the witnesses of ANZ Grindlays Bank. This in spite of the fact that on 13th September 1995 this matter had reached and was to go on. At the request of Mr. Dhond it was kept back till today. Even on that date the Court was not informed that witnesses of ANZ Grindlays should be kept ready in Court.

9. Today after the matter reaches, for the first time, a contention is being taken that the 1st Respondent is entitled to cross-examine witnesses of ANZ Grindlays Bank. To this proposition there can be no dispute. Mr. Dhond fairly admits that the 1st Respondent had known that the Affidavit filed by ANZ Grindlays Bank was evidence on



Affidavit. He however has no explanation why earlier it was not stated that the 1st Respondent desired to cross-examine. It is clear that the whole attempt has been to somehow or other delay the hearing of this Application. As this contention is being taken today it necessitates an adjournment. Court will now have to call the witnesses of ANZ Grindlays Bank as Court witnesses.

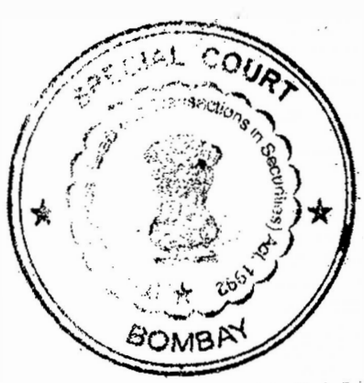
10. Mr. Dhond submits that before the witnesses of ANZ Grindlays Bank are examined the Applicant must first step into the witness box. He submits that it is the Applicant's case that they are the principal counter parties. He submits that the Applicant should first establish their case through their own witnesses. He submits that this is necessary as all the documents indicate that the Applicant has acted as a broker.

11. In support of this last submission he shows to the Court the Deal Slip which is annexed as Exhibit `A' to the Application. He submits that this Deal Slip clearly shows that the Applicant acted as a broker. In my prima facie view, this Deal Slip shows that the Applicant was the principal counter party to this transaction. In my prima facie view the Deal Slip shows the contrary to what Mr. Dhond is submitting. Mr. Dhond then shows Exhibit `B' to the Application namely the Contract Note. He submits that this Contract Note is in Form "A". He submits that as it is in Form "A" it is clear that the Applicant is a broker.

12. In this behalf it is necessary to mention what

this Court has been observing for the past three years. For the past three years the Court has been observing that in all cases the Contract Notes have been in Form "A". This irrespective of the fact whether the Notified Party acted as a principal or as a broker. In spite of all Contract Notes being in Form "A", in some matters purchasing Banks have honestly come to the Court and admitted that the Notified Party was the principal counter-party. There have been a large number of matters where Purchasing Banks have contended that the Notified Party was merely a broker. This Court has in an Order dt. 19th August 1995 in Chamber Summons No.34 of 1995 in Misc. Application No. 219 of 1993 negatived a contention that the Contract Notes would show that the Notified Party was a broker. The Court has held as follows:

> " However, this Court, during the past three years that it has functioned, has not yet come across any documents, in such transaction, wherein the Notified Parties are shown as principals. All documents have been on the footing that Notified Parties acted as Brokers. In spite of that this Court has found and many Banks have admitted, that the Notified Party was in fact the principal counter party. Therefore, merely because Documents show the Notified Party as a Broker does not by itself mean that Notified Party was not a principal."



The Court has also in a Ruling given on 14th June 1995 in Misc. Application 221 of 1993 held that the Contract Note by itself would not disclose whether the Notified person acted as a broker or a principal. Misc. Petition 221 of 1993 went through a protracted trial which is recently over. That case is pending Judgment. In that case also, based on the Contract Note it was contended that as the Contract Note was in Form "A", the Notified Party was a broker. It must be mentioned that the witness of the Respondent Bank, in Misc. Application 221 of 1993, ultimately admitted that merely by looking at the Contract Note it is not possible to say whether the person who issued the Contract Note was a broker or a principal.

13. It was pointed out to Mr. Dhond that the Court has already held as above. Mr. Dhond then took instructions from one Mr. Ranjan Srinath, Vice President of the PNB Mutual Fund. Mr. Dhond was instructed by the said Srinath to submit that merely by looking at the Contract Note Exhibit `B', without reference to any other document or record, it is possible to state that Harshad Mehta acted only as a broker. Mr. Srinath has been directed to put these instructions on Affidavit. Of course the evidence in Misc. Application 221 of 1993 is not binding in this case. However an Order of this Court would be binding. Thus at this stage, Court is prima-facie finding it difficult to accept the contention of Mr. Dhond. This in view of what this Court has been observing over the past three years and in view of fact that it has

already held to the contrary. However 1st Respondent are at liberty and entitled to establish the contrary.

14. In my prima-facie view, the mere existence of a Contract Note in Form "A" does not by itself show that the Applicant acted as a broker. Whether the Applicant acted as a broker or not depends on whether the amounts which the 1st Respondent paid went into Applicant's account and/or whether they went directly to ANZ Grindlays Bank. It also depends on who delivered the securities to the 1st Respondent.

15. Mr. Dhond submits that even if the evidence of ANZ Grindlays Bank is accepted it would only show that ANZ Grindlays Bank was not the counter party. He submits that this would not established that Harshad S. Mehta was the principal in this transaction. I am unable to accept this submission. This argument overlooks the specific case of the 1st Respondents. The specific case of the 1st Respondents is that their transaction was with ANZ Grindlays Bank. This argument overlooks the fact that ANZ Grindlays Bank evidence is to be the effect that amounts have been credited into the account of the Applicant and that the securities which have been received by the 1st Respondents were not securities of ANZ Grindlays Bank. Except for ANZ Grindlays bank, the 1st Respondent and the Applicant there is no other party connected with this transaction. It cannot be denied that the securities which are received are under this contract. If in

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the principal counter party.

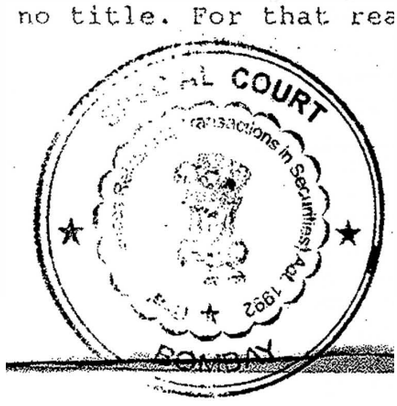
16. Mr. Dhond next submits that these are adversarial proceedings and that the knowledge which the Court has gained from other proceedings should not be imported into this Application. I am unable to accept this submission. The Legislature established one Court to try all these matters. The whole aim and purpose of this was that everything is before one Court. This so that the Court could learn and know how these transactions were performed and what the real state of affairs are. It is impossible that the Court not form prima-facie opinions based on what it has been observing. These however remain prima-facie opinions. Based on these opinions Court is not precluding parties from establishing the contrary. Till the contrary is shown to the Court, it cannot remain blind to facts coming before it.

17. Mr. Dhond submits that the Applicant must also prove that he owned these securities. Mr. Dhond submits that there are number of inconsistencies in the documents annexed by the Applicant in the Affidavit-in-Rejoinder. He submits that it will be necessary to cross-examine the Applicant on those aspects and on these documents.

18. In my view, it is not at all necessary to find out whether the Applicant owned these securities. The only question before the Court is whether there was a Ready Forward Transaction between the Applicant and the 1st Respondent on a principal to principal basis. Admittedly

the 1st Respondent got these securities under this Contract. Having got these securities under this Contract, it is not open to them to challenge the title of the party from whom they got the securities. If it is ultimately established that the Applicant was the principal counter party, then it would not be open to the 1st Respondents to challenge the title of the Applicant without first returning these securities. Also it is not necessary that Applicant should be owner of the securities. He could have got these securities under another Ready Forward Transaction or may have borrowed these securities. So far as this Application is concerned, title of Applicant is immaterial. If it gets established that Applicant was the principal counter-party, then how Applicant got the securities and gave them to the 1st Respondent is immaterial. If parties had restricted their transactions to securities owned by them there would have been no scam. The scam arose because, amongst other things, Notified Parties and Banks kept dealing with property of others and sometimes when they had no securities. Admittedly the 1st Respondent got the securities under this Contract. If the transaction has been between the Applicant and the 1st Respondent then, if Applicant was not the owner and dealt with someone else's property then there will be a claim against the Applicant for these securities. For that reason also the securities would have to be collected from the 1st Respondent. Further if Applicant had no title the 1st

no title. For that rea



return the securities. Thus the question of title Applicant and/or the question of cross-examining on inconsistencies in the documents in the Affidavit-in-Rejoinder on this aspect do not arise.

19. As stated above ANZ Grindlays Bank has filed evidence on Affidavit. In my view, unless this is contradicted, this evidence is conclusive of the matter. As stated above, the 1st Respondents are entitled to test this evidence by way of cross-examination. This is Court evidence. It must be led first. The parties can cross-examine. It is only after this, provided parties still desire to lead evidence, that the question of any party, including Applicants leading evidence arises. If by Court evidence all aspects are covered, then no necessity arises for protracted evidence of parties. I therefore reject submission of Mr. Dhond that Applicant must first step into the witness box.

20. I direct that on the next occasion the Application will cross-examine the witnesses of ANZ Grindlays Bank (if they so desire) and then the 1st Respondent will cross-examine witnesses of ANZ Grindlays Bank. Thereafter parties to decide whether they desire to lead any evidence.

21. It must be mentioned, only by way of prima facie observation, that the 1st Respondent claim that their contract was with ANZ Grindlays Bank. Admittedly, on 19th May 1992 there was no difficulty in performance of the reversal leg with ANZ Grindlays Bank. Under Bye-Law 235 of

the Bombay Stock Exchange, it was for the 1st Respondents to tender delivery on the reversal date. Significantly even though there was no difficulty in performing this contract with ANZ Grindlays Bank, there has been no reversal. The only difficulty, if any which might have existed on the reversal date, was the fact that, on 19th May 1992, the Applicant was in trouble because of the Scam having broken out.

22. ANZ Grindlays Bank is therefore directed to send to Court on 26th September 1995 one of the deponent of the Affidavit and if deponent is not personally conversant with facts of case to also send an Officer who is conversant with the facts of this case. All necessary documents in their possession, including duly certified statement of Account and delivery documents, must also be brought to Court by ANZ Grindlays Bank.

23. As this adjournment has been necessitated on account of the 1st Respondent's conduct, the 1st Respondent will pay costs of this adjournment fixed at Rs. 1,500/- each, to the Applicant and to the 2nd Respondent. Costs condition precedent.

24. Mr. Ranjan Srinath, Vice President, Finance of PNB Mutual Fund to state on Affidavit to be filed today that by merely looking at the Contract Note (a copy of which is annexed as Exhibit 'B' to this Application) and without referring to any other document or record, it is possible to state that Harshad S. Mehta acted only as a broker.

Sd - XXX
(S. N. VARIAVA, J.)
Judge Special Court

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OFFICER ON SPECIAL DUTY
Officer of the Special Court
Bombay

12/09

Applie on 10/09/2012
Pages 14
Examined by Mr. MUJUMDAR
Compared with DESHMUKH
Ready on 12/09/2012
Delivered on 04/01/2013

SPECIAL COURT
BOMBAY